92-1746

No. 92-___

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RAY BOSTIC,

Petitioner,

v.

CITY OF CHICAGO, JAMES PIENTA AND WILLIAM MARLEY,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's decision in *City of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991) permit police officers to hold a suspect in custody for up to 48 hours while the officers seek to gather additional evidence to justify the arrest?

2. May a municipality, consistent with the Fourth Amendment to the Constitution of the United States, authorize its police officers to hold an arrestee in custody beyond the time when he would normally be sent before a magistrate so that police officers may continue their investigation?

3. When a person seeks damages from a police officer for an arrest made without probable cause, may the police officer avoid liability by asserting that he "could" have believed that he had probable cause?

4. Does a detective, who has arrested a defendant in a criminal case, have any affirmative duty when he is present when eyewitnesses to the crime, after seeing the accused for the first time, state that the accused is innocent?

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No. 92-____

IN THE
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RAY BOSTIC,

Petitioner,

v.

CITY OF CHICAGO, JAMES PIENTA
AND WILLIAM MARLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Ray Bostic respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 23, 1992.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-8) is reported at 981 F.2d 965. The decision of the district court (App. 12-22) and the report and recommendation of the magistrate judge (App. 23-38) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 9) was entered on December 23, 1992; petitioner's timely petition for rehearing was denied on January 27, 1993. (App. 11.)

STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

STATEMENT

On June 30, 1985, a man named Curtis Cotton was fatally shot outside of a tavern in Chicago, Illinois. On July 2, 1985, the Chicago police department received an anonymous telephone call, which the police traced to petitioner's ex-girl friend Lisa Hodges. Hodges claimed to have been in the tavern when Cotton was shot and told the police that she had seen petitioner shoot Cotton.

After speaking with Hodges, Chicago police officers Pienta and Marley arrested petitioner as a suspect in the Cotton murder.[1] Petitioner, who was then employed as a correctional officer at a state penitentiary, denied involvement in the shooting and told the officers that he had been home

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1. The precise time when respondents initially placed petitioner under arrest was not litigated in the district court. The court of appeals concluded that petitioner was held in custody for about 47 hours before he was released. (Pet.App. 5.)

sleeping on the night that Cotton was shot. Petitioner also told the police that Lisa Hodges had been harassing him, and that on the same day that Hodges made the anonymous telephone call, petitioner had complained to the police about telephone threats from Hodges that she would kill him and burn his house down.[2]

After arresting petitioner, the officers gathered some evidence suggesting that petitioner may have been involved in the shooting.[3] After petitioner had been in custody for about 24 hours, the officers presented their evidence to a

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2. Petitioner's complaints about Hodges were documented in police reports prepared by the Chicago police officers who had responded to his complaint.

3. The officers gathered three pieces of evidence:

   1. Cotton had argued with two men inside of the tavern several hours before he was shot Petitioner was exhibited in a lineup on July 3rd and was identified by two witnesses as one of the men who had argued with Cotton.

   2. With petitioner's consent, the officers searched his home and found a firearm, cartridges, and an empty holster. Tests revealed that the firearm, which petitioner lawfully possessed as a correctional officer, had not been used to kill Cotton; respondents argued below that the empty holster was probative of petitioner's involvement in the homicide.

   3. Petitioner had not reported to work the day after Cotton was killed, but had called in sick. The officers were told that "[t]his was something he did not usually do." (Pet.App. 2.) Respondents argued below that because this was "unusual" (Pet.App. 6) it was probative of petitioner's guilt.

prosecutor, who refused to approve the filing of charges and told the officers that they did not have enough evidence. The officers, respondents Pienta and Marley, then invoked the "extended detention" policy of the Chicago Police Department,[4] and held petitioner for another 24 hours while they sought to gather more evidence. The officers failed to obtain any additional evidence and petitioner was released without charging at about 1:30 a.m. on July 5, 1985.

The officers continued to investigate the Cotton homicide after releasing petitioner. On July 6, 1985, an employee of the lounge picked out a picture of petitioner as the person who had argued with Cotton on the night of the homicide. On July 15, 1985, the officers obtained a description from Debra Wallace, one of the eyewitnesses to the shooting, that exculpated petitioner. (Pet.App. 35.) On July 19, 1985, Chicago police officers not involved in the homicide investigation arrested Lisa Hodges, petitioner's principal accuser, after she had thrown a rock through a window on petitioner's home.[5]

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4. Chicago Police Department General Order 78-1 "specifically provide[d] that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation." *Robinson v. City of Chicago*, 636 F.Supp. 186, 192 (N.D.Ill. 1986), *rev'd on grounds unrelated to the merits (lack of standing)*, 868 F.2d 959 (7th Cir. 1989). The rule was abrogated after the district court's decision in *Robinson*. See *Willis v. Bell*, 726 F.Supp. 1118, 1124 (N.D.Ill. 1989).

5. Hodges had previously been arrested by Chicago police officers on April 24, 1985, after she had delivered an harassing letter to plaintiff. In her letter, Hodges had threatened, *inter alia*, to burn petitioner's automobile.

On August 5, 1985, respondent Pienta arranged for a witness to the tavern arguments, Steve Burks, to come to the police station to view petitioner in a line-up. Pienta arrested petitioner when petitioner refused to stand in the line-up.[6] After Burks viewed petitioner in a one-man showup,[7] a prosecutor approved the filing of murder charges. Petitioner was held in custody until April 29, 1986 when he was acquitted at a one day bench trial.

On February 21, 1986, the date on which the state criminal case was originally set for trial, Evelyn and Barbara McMiller, two eyewitnesses to the Cotton homicide, came to court in response to subpoenaes from the prosecution. These eyewitnesses had a chance to observe petitioner; when they first saw him, each knew that petitioner was not the man they had seen shoot Cotton.

As they were leaving the courtroom, Barbara and Evelyn saw a man who identified himself as a detective. Barbara and Evelyn McMiller each told the detective that Bostic was not the man who had shot Cotton. The detective asked if they were sure; the McMiller's said "yes" and left. One of the detectives who was in court that day was defendant Pienta.

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6. Respondents argued in the court of appeals that Pienta could weigh petitioner's refusal to stand in the lineup as evidence of probable cause. (Brief of Appellees, *Bostic v. Chicago,* 7th Cir., No. 91-2458, 28, 29 & n.11.)

7. At the criminal trial, Burks could not identify petitioner as the man he had seen argue with Cotton.

Following his acquittal, petitioner filed an action under 42 U.S.C. §1983 against the City of Chicago and several police officers, including respondents Pienta and Marley. Petitioner asserted five claims in his second amended complaint; four are relevant here:[8] In Counts I and II, petitioner contended that his post-arrest detention from July 3, 1985 to July 5, 1985 exceeded the brief period of post-arrest detention of *Gerstein v. Pugh*, 420 U.S. 103 (1975) that is permitted by the Fourth Amendment. In Count I, plaintiff sought to impose liability for his post-arrest detention on respondents Pienta and Marley; in Count II, plaintiff sought to impose liability for the post-arrest detention on the City of Chicago. In Count III, petitioner asserted that respondent Pienta did not have probable cause for the second arrest on August 5, 1985. In Count IV, petitioner alleged that he had been deprived of due process of law when respondent Pienta did not take any action after being told on February 21, 1986 by eyewitnesses Barbara and Evelyn McMiller that plaintiff was not the man who shot Cotton.

On cross-motions for summary judgment, the magistrate judge recommended that summary judgment be entered for petitioner on his claims involving post-arrest detention (Pet.App.28-30), and that the count involving suppression of the exculpatory McMiller evidence proceed to trial. (Pet.App. 37-38.) The magistrate judge recommended that summary judgment be granted for respondent Pienta on the probable cause to arrest claim, concluding that although the

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8. Petitioner did not challenge the dismissal of his fifth claim, involving the suppression of exculpatory statements made in a polygraph exam.

probable cause question was close, Pienta was entitled to qualified immunity because he "could have thought" that he had probable cause. (Pet.App. 34.)

The district court adopted the magistrate judge's recommendation on the probable cause to arrest claim. The district court agreed that the probable cause question was "close" (Pet.App. 21), but held that Pienta satisfied the "less stringent standard" of probable cause required for qualified immunity. (Id.)

The district court rejected the magistrate's recommendation on the detention claims, holding that it had been permissible for respondents to hold petitioner in custody when, after the prosecutor refused to approve the filing of charge, the officers tried to "collect[] witnesses for a line-up." (Pet.App. 15.)

The district court also rejected the magistrate's recommendation on the claim involving the suppression of the McMiller exculpatory evidence. The district court found that respondent Pienta was entitled to qualified immunity, because his duty to come forward and tell the prosecutor that he had arrested an innocent man was not clearly established. (Pet.app. 18.)

On appeal, the Seventh Circuit affirmed. The court of appeals held that petitioner had failed to meet the burden established in *City of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991), of showing that he had been held for more than 48 hours.[9] In the view of the court of appeals, petitioner had

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9. In his petition for rehearing, petitioner pointed out that the 48 hours period of *Riverside* had been enunciated after the summary judgment motion had been fully briefed and was awaiting decision by the district judge. The court of appeals denied rehearing without opinion. (Pet.App. 11.)

not been subjected to excessive post-arrest detention even though the police had held petitioner in custody while they sought to gather additional evidence, because the officers had acted "with reasonable promptness to complete the investigation." (Pet.App. 5.) The court below held that Pienta had probable cause to arrest (Pet.App. 7) because "a prudent person could have believed that Bostic killed Cotton." (Pet.App. 7.) The court of appeals also held that petitioner had failed to come forward with enough evidence to show that respondent "Pienta was the detective to whom the McMillers spoke." (Pet.App. 7.)

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions involving the propriety of post-arrest investigative detention and the use of summary judgment in civil rights cases involving issues of qualified immunity and probable cause.

-I-
Post-Arrest Detention

The lower federal courts have disagreed about the Court's decision in *City of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). Several courts have adopted the position of the Seventh Circuit in this case that *Riverside* legitimizes 48 hours of post-arrest detention while the police seek to build a case against the arrestee. See, e.g., *Roundtree v. City of New York*, 778 F.Supp. 614 (E.D.N.Y. 1991), where the court read *Riverside* as setting out the rule "that detention of an individual for 48 hours prior to a hearing to determine probable cause for his arrest does not violate the Fourth Amendment." Id. at 620. Similarly, in *United States v. Mills*, 964 F.2d 1186 (D.C. Cir. 1991), the court described *Riverside* as upholding post-arrest detention for up to 48 hours. Id. at

1189 n.5.

A different view of *Riverside* was expressed by the Tenth Circuit in *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991), where the court of appeals wrote that *Riverside* did not authorize 48 hours of post-arrest detention because "detention for a lesser period may still be unconstitutional." 945 F.2d at 1162. The decision of the Eighth Circuit in *Wayland v. City of Springdale, Arkansas*, 933 F.2d 668 (8th Cir. 1991), is in accord. There, the court of appeals held that while *Riverside* shifts the burden of proof to the government after 48 hours of detention, "[t]he facts of each case must be considered to determine whether a detainee is held unnecessarily." Id. at 670.

In this case, petitioner was held in custody after the prosecutor refused to file charges because the police were "try[ing] to find further evidence" (Pet.App. 27) and "complete the investigation." (Pet.App. 5.) This Court has repeatedly held that the Fourth Amendment does not permit the police to hold a suspect in custody while the police seek to gather more evidence. See *Riverside, supra*, 111 S.Ct. at 1676 n.3 (Scalia, J., dissenting); *Gerstein v. Pugh*, 420 U.S. 103, 120 n.21 (1975); *Mallory v. United States*, 354 U.S. 449, 456 (1957). Nothing in *Riverside* changed this view of the Fourth Amendment.

In *Riverside*, the Court resolved a conflict between the circuits about the statement in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that a warrantless arrest must be followed by a "prompt judicial determination of probable cause." The majority in *Riverside* rejected the view that "prompt" means immediately after completion of the administrative steps incident to arrest, and held that a jurisdiction which provides for a judicial determination of probable cause within 48 hours of arrest "will be immune from systemic challenge."

111 S.Ct. at 1670.

The *Riverside* majority made clear, however, that the immunity from systemic challenges is not a blank check for 48 hours of post-arrest detention (111 S.Ct. at 1670):

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. ***Examples of unreasonable delays are delays for the purpose of gathering additional evidence to justify the arrest,*** a delay motivated by ill will against the arrested individual, or delay for delay's sake. (emphasis supplied)

The Seventh Circuit's view that *Riverside* authorizes post-arrest detention while the police "complete the investigation" (Pet.App. 7) is at odds with *Riverside* and is in conflict with decisions in the Eighth and Tenth Circuits. Certiorari should be granted to resolve this conflict about a fundamental constitutional right.

-II-
Qualified Immunity and Probable Cause to Arrest

This case presents what Judge Posner recently described as the "fearful tangle" when a qualified immunity defense is raised to a claim that an arrest was made without probable cause. *Mahoney v. Kesery,* 976 F.2d 1054, 1059 (7th Cir. 1992).

Probable cause to make a warrantless arrest turns on whether "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

warrant a man of reasonable cause in the belief that 'an offense has been or is being committed.''' *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (brackets in original)). The standard for qualified immunity is similar: ''whether a reasonably well trained officer in [defendant's] position would have known'' that the facts and circumstances were not enough to establish probable cause. *Malley v. Briggs,* 475 U.S. 335, 345 (1986).

In *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). the Court substituted a ''could have believed'' in place of the traditional ''would have believed.'' Id. at 641. Building on the Court's use of ''could,'' the lower federal courts have fashioned a lesser standard of probable cause for a qualified immunity defense. See e.g., *Von Stein v. Brescher,* 904 F.2d 572, 579 (11th Cir. 1990) (''[a]ctual probable cause is not necessary''; qualified immunity turns on ''whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest''); *Gorra v. Hanson,* 880 F.2d 95, 97 (8th Cir. 1989) (''[a]ctual probable cause is not necessary for an arrest to be objectively reasonable''; the question is whether ''a reasonable officer could have believed that probable cause existed''); *Floyd v. Farrell,* 765 F.2d 1, 5 (1st Cir. 1985) (qualified immunity when probable cause is ''at least arguable''); *Hughes v. Meyer,* 880 F.2d 967, 970 (7th Cir. 1989) (''even in the absence of probable cause for an arrest, qualified immunity provides officers with an additional layer of protection against civil liability.'')

This lesser standard of probable cause was applied by the Seventh Circuit in this case: rather than answer the question of whether a reasonably prudent officer *would* have believed that there was probable cause to re-arrest petitioner in August, the magistrate judge (Pet.App. 34), the district judge (Pet.App. 21) and the court of appeals considered whether ''a

prudent person *could* have believed that Bostic killed Cotton." (Pet.App. 7.)

A "could have believed" rule of probable cause demeans the reasonableness standard of the Fourth Amendment, especially when, as in this case, an arrest is made for a concededly unlawful purpose, i.e., to exhibit a suspect in a lineup. A "could have believed" rule also undercuts the basic right to a jury determination of reasonableness and excludes from the reasonableness calculus facts that the officer should have known, e.g., that petitioner's principal accuser was a vengeful ex-girlfriend, who had harassed and threatened petitioner.

The Court recent *per curiam* reversal in *Hunter v. Bryant*, 112 S.Ct. 534 (1991) has added to the confusion concerning qualified immunity and probable cause. See *Act Up!/Portland v. Bagley*, ___ F.2d ___ (No. 90-35888,9th Cir., February 10, 1993) (Norris, J., dissenting from denial of rehearing en banc). Plenary consideration of this issue is warranted.

-III-
A Detective's Duty to Come Forward with Exculpatory Evidence

In opposing respondent Pienta's motion for summary judgment, petitioner presented the deposition testimony of Barbara and Evelyn McMiller that when they came to state court on February 21, 1986, each knew on first seeing petitioner that he was not the man they had seen shoot Cotton. (Barbara McMiller Dep. 45.) As they were leaving the courtroom, Barbara and Evelyn saw a man who identified himself as a detective. (Barbara McMiller Dep. 45.) Barbara and Evelyn McMiller each told the detective that Bostic was not the man who had shot Cotton. (Barbara McMiller Dep. 15; Evelyn McMiller Dep. 13, 49, The detective asked if they were sure; the McMillers' said "yes" and left. (Barbara

McMiller Dep. 47.) One of the detectives who was in court that day was respondent Pienta. (Pet.App. 17-18.)

In the view of the district court, Pienta did not have any obligation to act on the information that he had arrested an innocent man because the obligation was not "clearly established." (Pet.App. 18.) This is plainly wrong: A police officer's duty to correct his wrongful arrest of an innocent man is so basic that direct precedent should not be required. Taken one step further, Pienta's argument is that Cain should not have known that murder was wrong because the commandments had not been announced.

The court of appeals affirmed on a different ground, stating that petitioner "only alleges that Pienta was one of several detectives in the same room with the McMillers." (Pet.App. 7.) But as the district judge recognized, petitioner alleges much more. Pienta was in state court the same day as the McMillers and a jury could infer that the detective who spoke to the McMillers in court was respondent Pienta.

CONCLUSION

The petition for writ of certiorari should be granted.

April, 1993

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-2458

RAY BOSTIC,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, JAMES PIENTA and WILLIAM MARLEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5482—**John A. Nordberg**, *Judge.*

ARGUED OCTOBER 20, 1992—DECIDED DECEMBER 23, 1992

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

BAUER, *Chief Judge.* Ray Bostic sued the City of Chicago ("the City") and two Chicago Police Department Detectives, James Pienta and William Marley, under 42 U.S.C. § 1983 claiming that defendants violated his Fourth Amendment rights. The district court granted summary judgment in favor of the defendants and Bostic appealed. Because we find no violation of Bostic's constitutional rights, we affirm.

I. Facts

On June 30, 1985, Curtis Cotton was shot to death outside the Illusion Lounge, a Chicago tavern. Lisa Hodges, Bostic's ex-girlfriend, anonymously called the police and said that Bostic had killed Cotton. After the police traced the call to Hodges, she told them in an interview that she was at the Illusion Lounge on the night of the murder and that she saw Bostic lowering a gun after she heard gunfire. On July 3, 1985, the police arrested Bostic for the murder. The police conducted a search of Bostic's apartment and found a .38 caliber gun, cartridges, and an empty holster. The police also discovered that Bostic had called in sick at work the morning after the shooting. This was something he did not usually do. After almost 24 hours, an assistant state's attorney, James Andreou, decided not to file charges against Bostic. Appellant's Brief at 4. Pienta and Marley decided to keep Bostic in custody while the investigation continued. *Id.* This decision was consistent with Chicago Police Department policy. Finally, on July 5, 1985, at about 1:30 a.m., the police released Bostic.

After releasing Bostic, the Chicago police continued investigating the Cotton murder. The police interviewed several witnesses, all of whom gave varying descriptions of the person who killed Cotton. The description of at least one witness, Debra Wallace, described Cotton's assailants as much shorter and younger than Bostic. *See* Appellant's Brief at 5. Another witness, Steve Burks, claimed that he saw Bostic arguing with Cotton on the night of the murder.

Next, on August 5, 1985, Pienta re-arrested Bostic. Unlike the first arrest, this time an assistant state's attorney decided to file murder charges against Bostic. On August 6, 1985, Bostic appeared in a Cook County Circuit Court and bond was set at $100,000. Bostic was unable to pay his bond and so he remained in jail. On August 30, 1985, a grand jury returned an indictment which charged Bostic with murder and armed violence.

Bostic's trial was set for February 21, 1986. On that date, two eyewitnesses to the Cotton homicide—Evelyn and Barbara McMiller—came to court pursuant to subpoenas. The McMillers did not testify, however, because the case was continued on Bostic's motion to April 29, 1986. As they were leaving the courtroom, the McMillers each told a man who identified himself as a detective that Bostic was not the man who had shot Cotton. *Id.* at 8. Pienta was one of several detectives who was in court on February 21, 1986. Bostic was held in custody until his trial on April 29, 1986. After a one day bench trial, the trial judge acquitted Bostic and ordered him released.

Bostic sued the City and detectives Pienta and Marley pursuant to 42 U.S.C. § 1983 claiming civil rights violations. Both sides moved for summary judgment. The district court denied Bostic's motion for summary judgment and granted the defendants' motion for summary judgment. Bostic appeals.

II. Analysis

We review a district court's grant of summary judgment *de novo*. We accept all facts and inferences in the light most favorable to the non-moving party. Where the pleadings, depositions, answers to interrogatories, affidavits, if any, and admissions on file show that there is no genuine issue of material fact, the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Vukadinovich v. Board of School Trustees*, No. 91-3480, 1992 U.S. App. LEXIS 2899, at *9-*10 (7th Cir. Oct. 30, 1992).

A. *Post-Arrest Detention*

Bostic complains that the defendants violated his Fourth Amendment rights when, on July 3, 1985, they arrested him without a warrant and kept him in custody for more

than 48 hours without a judicial probable cause determination.[1] We disagree.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114. This judicial determination, the Court stated, must be "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest. *Id.* at 125. The Court has recently clarified what it meant in *Gerstein* by "promptly after arrest." "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *City of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991). The Court in *Riverside* established 48 hours as the point at which the burden of proof shifts. If an arrested individual does not receive a probable cause determination within 48 hours, "the arrested individual does not bear the burden of proving unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* The Court cautioned that this is not a rigid standard for courts to apply blindly.

> In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested per-

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[1] The Fourth Amendment requires that

> [t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> sons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id.

In this case, Bostic's detention was not unreasonable. The parties do not dispute that he was released at 1:30 a.m. on July 5, 1985. Under *Riverside*, Bostic bears the initial burden of persuasion. He must show that he was arrested by 1:30 a.m. on July 3, 1985 to shift that burden to the defendants. Once he establishes that more than 48 hours elapsed, the burden shifts to the defendants to show that his detention was unreasonable. *Id.* At his deposition, Bostic stated that he went to the police station at 12:35 a.m. on July 3, 1985. Bostic Dep. at 216. He said that he was taken to a room where he talked with Detective Pienta and his partner for "roughly, about half an hour." *Id.* He did not say, however, how much time elapsed between 12:35 and the time he went to speak with Pienta. When asked if he recalled what time it was when he went into the room with Pienta, Bostic answered, "No sir. No, I don't even know the time." *Id.* Bostic claims that after his approximately half hour talk with Pienta, he was locked in a room. Bostic thus presents no evidence that he was arrested before 1:30 a.m. on July 3, 1985. Therefore, under *Riverside*, he retains the burden of proving that his detention was unreasonable. *Id.*

He has not satisfied that burden. Allowing for the "substantial degree of flexibility" required by *Riverside*, we note that Bostic was arrested late at night when it is likely that no magistrate was readily available. The police arrested Bostic only after a witness identified him as Cotton's murderer. After the arrest, the police acted with reasonable promptness to complete the investigation, rather than releasing a suspected murderer without charges. The Fourth Amendment, as interpreted in *Gerstein* and *Riverside*, requires no more. Bostic's detention after his July 3, 1985 arrest was not unlawful.

B. *August 5, 1985 Arrest*

After the police released Bostic on July 5, 1985, they continued to investigate the Cotton murder. On August 5, 1985, believing they had sufficient evidence to prosecute, the police arrested Bostic. Bostic claims that the August 5, 1985 arrest was illegal because the defendants did not have probable cause. We disagree.

For an arrest to be constitutionally valid, it must be made with probable cause. Although probable cause requires more than mere suspicion, it does not require that the evidence at the time of arrest be sufficient to prove guilt beyond a reasonable doubt. *Warlick v. Cross*, 969 F.2d 303, 306 (7th Cir. 1992); *Hughes v. Meyer*, 880 F.2d 967 (7th Cir.), *cert. denied*, 495 U.S. 931 (1989). Rather, probable cause exists if, at the moment of the arrest, the facts and circumstances within the knowledge of the police officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the petitioner had committed or was committing an offense. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Warlick*, 969 F.2d at 306; *United States v. Burrell*, 963 F.2d 976, 986 (7th Cir.), *cert. denied*, 121 L. Ed. 270 (1992).

Between the time of Bostic's release and his second arrest on August 5, 1985, they gathered more evidence that suggested Bostic might have killed Cotton. At the time of the July 3 arrest, they already had one person, Lisa Hodges, who claimed to have seen Bostic shoot Cotton. After Bostic's release, another witness, Steve Burks, identified Bostic as having had an argument with Cotton the night Cotton was killed. Appellees' Brief at 13. So, by the August 5 arrest, the police had two witnesses incriminating Bostic (Hodges and Burks), had found an empty holster in Bostic's apartment, and also knew that Bostic had called in sick the morning after the shooting, which was unusual. *Id.* at 28. Further, two other eyewitnesses, William Hampton and Ronald Walton, picked Bostic out of a lineup as the man who had argued with Cotton on

the night of the murder. *Id.* Given the evidence against Bostic at this point, we conclude that a prudent person could have believed that Bostic killed Cotton. Clearly, therefore, probable cause existed to arrest Bostic on August 5, 1985.

C. *The McMiller Evidence*

Bostic contends that defendant Pienta heard Barbara and Evelyn McMiller state that Bostic was not the person who had murdered Cotton. He claims that Pienta had a duty to come forward with this exculpatory evidence and that, by not doing so, Pienta breached that duty. Appellant's Brief at 13-14. Bostic, however, produces no evidence that Pienta was the detective to whom the McMillers spoke. He merely alleges that Pienta was in the room, with several other detectives, when the McMillers made their comments that Bostic was not the man who killed Cotton.

We note that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). *See also, Fisher v. Transco Servs.-Milwaukee, Inc.*, No. 91-2742, 1992 U.S. App. LEXIS 30201 (7th Cir. Nov. 17, 1992), at *6. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. In this case, the evidence is barely colorable. Bostic only alleges that Pienta was one of several detectives in the same room with the McMillers. This does not defeat defendants' motion for summary judgment.

III. Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-23-92

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

RAY BOSTIC,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, JAMES PIENTA,
WILLIAM MARLEY, WILLIAM PEDERSON, ANDZ

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 86 C 5482 **John A. Nordberg,** *Judge.*

[December 23, 1992]

HON. WILLIAM A. BAUER, Chief Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JESSE E. ESCHBACH, Circuit Judge

JUDGMENT — ORAL ARGUMENT

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

[January 6, 1993]
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

RAY BOSTIC,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, JAMES PIENTA,
WILLIAM MARLEY, WILLIAM PEDERSON, ANDZ

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 86 C 5482 **John A. Nordberg,** *Judge.*

HON. WILLIAM A. BAUER, Chief Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JESSE E. ESCHBACH, Circuit Judge

ORDER

The opinion of the Court dated December 23, 1992 is hereby corrected. On page 5, first full paragraph, line 8 should read ". . . that his detention was reasonable."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

RAY BOSTIC,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, JAMES PIENTA,
WILLIAM MARLEY, WILLIAM PEDERSON, ANDZ

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 86 C 5482 **John A. Nordberg,** *Judge.*

[January 27, 1993]

HON. WILLIAM A. BAUER, Chief Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JESSE E. ESCHBACH, Circuit Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the plaintiff-appellant, all of the judges on the original panel have voted to deny and no judge in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAY BOSTIC,

Plaintiff,

No. 86 C 5482 *v.*

CITY OF CHICAGO, JAMES PIENTA,
WILLIAM MARLEY, WILLIAM PEDERSON, AND
PAT MOKRAY,

Defendants.

MEMORANDUM OPINION AND ORDER

Ray Bostic filed a five-count second amended complaint alleging that the City of Chicago and Chicago Police Department detectives William Marley and James Pienta violated his rights under 42 U.S.C. 1983. Both parties filed motions for summary judgment. On December 13, 1990, the Honorable Elaine E. Bucklo, United States Magistrate Judge, entered a Report and Recommendation advising that summary judgment be granted to Mr. Bostic on Counts I and II, that summary judgment be granted to detective Pienta on Count III and to the City of Chicago on Count IV, and that detectives Pienta's and Marley's motion for summary judgment be denied on Count V.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, both parties filed their objections to the Magistrate Judge's Report. Bostic also filed a reply. Rule 72(b) requires de novo review of those portions of the Report and Recommendation to which the parties have specifically objected. Accordingly, the court has reviewed the relevant parts of the Report, and accepts in part and rejects in part the Magistrate Judge's recommendations, based on a subsequent decision by the United States Supreme Court. For the reasons stated below, Ray Bostic's motion for summary judgment is denied as to all counts. Defendants' motion for summary judgment is granted as to all counts. This case is dismissed.

FACTS

The court adopts the statement of facts set forth in the Magistrate Judge's Report and Recommendation, attached to this Memorandum Opinion and Order.

DISCUSSION

I. Defendants' objections.

Count I of Bostic's second amended complaint charges detectives Marley and Pienta with unlawful detention. Magistrate Judge Bucklo recommended that summary judgment be granted to Bostic on Count I. Defendants raise several objections. First, they assert that "the magistrate did not even address defendants' point that plaintiff did not contest probable cause for his arrest, which is a necessary element of any fourth amendment claim." Def. Objections p. 2. Defendnts refer the court to pages 7-9 of their supporting memorandum, in which they cite *Patton v. Przybylski*, 822 F.2d 697 (7th Cir. 1987), *Rodgers v. Lincoln Towing Service, Inc.*, F.2d 194 (7th Cir. 1985), and *Bergren v. City of Milwaukee*, 811 F.2d 1139 (7th Cir. 1987), to support this proposition.

These cases do not stand for the proposition advanced by defendants. Nowhere do they hold that a claim for unlawful detention can proceed only if the plaintiff first contests probable cause. Indeed, the law is plainly to the contrary. *See, e.g., Hood v. City of Chicago*, 1987 U.S. Dis. LEXIS 12082 *4-5 (N.D. Ill. 1987) ("[t]he City argues that since plainiff does not dispute probable cause to arrest he cannot dispute probable cause to detain. The existence of probable cause to arrest does not however present a bar to a Fourth Amendment claim for excessive detention following arrest."); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1351 (7th Cir. 1985); *Fisher v. Washington Metro Area Transit Authority*, 690 F.2d 1133, 1141 (4th Cir. 1982).

Defendants' second objection is that "the magistrate failed to determine whether or not the state's attorney felony review process is a proper administrative step incident to arrest." Def. Objection p.2. Bostic addressed this argument in his response to defendants' motion: "[t]his case does not involve the question of proper administrative incident of arrest'...In this case, plainiff is

complaining about his detention after the prosecutor refused to approve the filing of charges." Plaintiff's Response, pp.4-5. The prosecutor reached that decision late in the evening of July 3, 1985, nearly 26 hours before Bostic's release.

Defendants argue that Bostic's detention following the prosecutor's decision should be deemed a "proper administrative step incident to arrest," because the prosecutor only temporarily declined to charge Bostic until line-ups with other witnesses could be arranged. Memorandum in Support p.13. At issue is the central question in Counts I and II of the complaint: whether Bostic's 26-hour detention, conducted for the purpose of arranging line-ups, violated the Constitution. Magistrate Judge Bucklo found that it did, relying on *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985). *Llaguno* permitted only "some interval for booking the arrested person and completing other paperwork before presenting him to the magistrate." Llaguno, at 1668.

Together with other circuits, the *Llaguno* court tackled a question unresolved by the Supreme Court: how long a "brief period of detention necessary to take administrative steps incident to arrest," *Gerstein v. Pugh*, 420 U.S. 103, 113-114 (1975), may be. Estimates ranged from one and one-half hours (*Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978)), to two hours (American Law Institute recommendation), to four hours (*Gramenos v. Jewel Cos.*, 797 F.2d 432 (7th Cir. 1986), *cert. den.* 481 U.S. 1028 (1987)), to 24 hours (*Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1985), and *Sanders v. City of Houston*, 543 F. Supp. 694, 702 (S.D. Tex. 1982)), to 72 hours (*Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988)).

The question has been resolved. On May 13, 1991, the Supreme Court decided what is prompt under Gerstein. "Taking into account the competing interests articulated in Gerstein," said the Court in *County of Riverside v. McLaughlin*, ___U.S.___, 1991 U.S. LEXIS 2528, "we believe that jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." *Riverside*, 1991 U.S. LEXIS 2528 *22. The 26-hour period to which Bostic objects falls well within this limit. He cannot sustain a cause of action for the violation of his constitutional

rights.

Riverside does preserve Llaguno's injunction against detaining a suspect for the sole purpose of "build[ing] a case against [him] while he [is] in jail." *Llagauno,* at 1568. *See Riverside,* at *23 (delays "for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake" are unreasonable). Noting that "Mr. Bostic had already been held 24 hours at the time the state's attorney declined to charge him," the Magistrate Judge concluded that "the only purpose in holding him for any additional time was...to try to find further evidence." R & R p.6. That Bostic had been held for some time prior to the prosecutor's decision has little relevance, however, given Bostic's expressed desire to challenge his detention only after that decision. Stipulation 3.07.

As to the reason of Bostic's continued detention, the evidence is undisputed: the police held him while they collected witnesses for a line-up. According to one case cited by Bostic himself, "conducting line-ups...may be proper administrative steps incident to arrest." *Sanders v. City of Houston,* 543 F. Supp. 694, 700 (S.D. Tex. 1982). There is no evidence of police efforts to conduct further investigations of the facts, or any suggestion of untoward motives. Bostic attaches undue weight to the prosecutor's decision not to bring charges, as if that were tantamount to a finding of no probable cause following which no suspect could be constitutionally detained. No priciple of law so holds.

In light of *County of Riverside v. McLaughlin,* the court finds Bostic's detention did not violate Gerstein's injunction against detaining suspects beyond the "brief period of detention necessary to take the administrative steps incident to arrest." *Gerstein,* at 113-114 (1975). The court therefore denies Bostic's motion fo summary judgment on Count I. Defendants' motion for summary judgment on Count I is granted.

Count II of the second amended complaint charges the City with enforcing an unconstitutional detention policy, namely, Section 6, paragraph C-2 of General Order 78-1. the Magistrate Judge advised that Bostic's motion for summary judgment be granted on this count. Defendants insist that "the magistrate ignores the evidence that Chicago Police Department Order 78-1 ("General Order

78-1'') does not on its face authorize detentions in violation of the fourth amendment.'' Def. Objections p.4. Two courts in this district have held otherwise. *See Willis v. Bell,* 726 F. Supp. 1118 (N.D. Ill. 1989); *Robinson v. City of Chicago,* 638 F. Supp. 186, 191-93 (N.D. Ill. 1986), *rev'd on other grounds unrelated to the merits (lack of standing),* 868 F.2d 959 (7th Cir. 1989).

Defendants object to the Magistrate's reliance on Robinson, because it ''is basic jurisprudence that a reversed case is of no precedential value.'' Def. Objections p.4. No rule of jurisprudence forbids one court from adopting the reasoning of another, however, and that is precisely what Judge Shadur did in *Willis:* ''[t]his court is in full agreement with the reasoning and result of Robinson and, rejecting the City's protestations, finds the same result must obtain here.'' Willis at 1125. *Robinson* explained why Paragraph C-2 was facially invalid:

> Paragraphs C-2 permits the exact type of extended detention which the Court in Gerstein found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy of extended detention is obvious; to build a case against a defendant while he is in jail. However, the teaching of Gerstein in this regard is clear -- hoping to build a case is not a permissible reason for jailing someone indefinitely.

Id., quoting *Robinson* at 192. *Willis* remains good law, and it was that case, together with the analysis in Robinson, upon which the Magistrate Judge relied.[1] Nevertheless, for the same reason that

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1. After *Robinson* issued, the Chicago Police Department rescinded the extended detention policy of Paragraph C-2. *Willis* at 1124, n.16.

   Defendants argue that *Willis* is distinguishable ''because the plaintiff in *Willis* was contesting the City's detention policy solely as it related to holding him for crimes other than the ones

Count I fails, Count II must fail as well. Paragraph C-2 may well have authorized detentions of unconstitutional purpose and length, but Bostic was not detained longer than due process permits, or for a purpose that due process forbids. In light of *Riverside,* Bostic's detention simply did not violate the Constitution. Whether Paragraph C-2 was unconstitutional is therefore irrelevant: Bostic sufferred no injury actionable under Section 1983. Accordingly, the court denies plaintiff's motion for summary judgment with respect to Count II. Defendants' motion for summary judgment is granted on Count II.

Count V of the second amended complaint charges defendants Marley and Pienta with concealing exculpatory evidence. Magistrate Judge Bucklo recommended that defendants' motion for summary judgment be denied with respect to this court. Defendants raise several objections. Two of them are well-taken and compel the court to grant their motion for summary judgment.

Defendants assert that Bostic "has produced no evidence that Marley was even present at the courthouse when the alleged exculpatory statement was made," and so "no violation...is stated against him." Def. Objections p.5. Evelyn McMiller testified at her deposition that she told a detective wearing a caramel colored sports jacket, whom she met during a court appearance in the Bostic case, that Bostic "is not the one, and I'm not coming back." Pl. Exh. 40 p.49. Her sister Barbara also testified that she told the same detective that "he's not the one. You all have the wrong man." Pl. Exh. 41 p.46. Neither woman identified the detective by name. Bostic has produced a "Court Attendance Report" indicating that detective Pienta was present in court on the day in

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for which he was originally arrested." Def. Objections p.4. But *Willis* explicitly held that Paragraph C-2 violated Fourth Amendment standards "[b]oth on its face and as applied..." *Willis* at 1124. In any event, the reasoning in *Willis* makes clear that Paragraph C-2 unconstitutionally extended detention periods.

question.. Pl. Exh. 35. There is no evidence to suggest Marley's presence.[2] Count V must be dismissed as against him for this reason.

In any event, because they are entitled to qualified immunity, both defendants must be granted summary judgment with respect to Count V. Magistrate Judge Bucklo disagreed: "Any reasonable officer should know that if two eye witnesses state that a defendant -- here already incarcerated for several months -- is not the guilty party, that information should be promptly brought to he attention of the prosecuting attorney." R & R p.22. Under the doctrine of qualified immunity, however, a defendant cannot be held liable in damages for conduct that is simply "unreasonable." Rather, he must have violated a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 828 (1982). For a right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 383 U.S. 635, 640 (1987).

No case has held as a matter of constitutional law that an officer must disclose exculpatory evidence to a prosecutor. The court in *Clarke v. Montgomery Ward and Co.*, 298 F.2d 346, 348 (4th Cir. 1962), upon which Bostic relies, merely opined that "a person who places information upon which criminal proceedings are begun, and who later acquires additional information casting doubt upon the accused's guilt, should be under an obligation to disclose his discovery to the prosecutor." When the Seventh Circuit did speak to the issue in *Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980), it set forth a narrow principle:

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2. Citing the Court Attendance Report, Bostic states that "[t]he detectives who were in court that day were defendants Pienta and Marley." Pl. Response p.3. Nowhere in the Court Attendance Report does Marley's name appear. Bostic's statement to the contrary is conclusory error.

> If the officer undertakes to make decisions which are not his to make and then intentionally misleads those who do have the ultimate authority to authorize the arrest, that officer may be found to have deprived the arrestee of his liberty without due process of law. Although some of the defendant's acts of omission may have been only negligent, there is a strong suggestion of intentional and concealed corner-cutting to accomplish the arrest.

Seibel, at 687.

. There is no evidence of intentional concealment or cornercutting in this case. The Magistrate Judge said as much in her Report and Recommendation. R & R p. 21 (''Here there is no evidence that the police officers intentionally concealed facts from the prosecutor leading to the charges against Mr. Bostic.''). That being so, defendants are entitled to qulified immunity.

Accordingly, defendants' motion for summary judgment with respect to Count V is granted.

II. Plaintiff's objections.

Count III of the amended complaint charges defendants with unlawfully arresting Bostic on August 5, 1985. Magistrate Judge Bucklo concluded that defendant Pienta ''could have reasonably found that probable cause existed for his rearrest of Mr. Bostic on August 7, 1985.'' R & R p.12.[3] Bostic raises several objections. First, he contends that the Magistrate Judge ''erred in rejecting Plaintiff's argument that the lawfulness of the August arrest turns on the additional evidence, if any, that the police uncovered after plaintiff's release in July of 1985.'' Pl. Objections p.2.

Stated differently, Bostic argues that because the state's attorney declined to charge him in July, probable cause to arrest him in

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3. The parties (and the Magistrate Judge) apparently agree that Count III is properly directed only at Pienta, and not also Marley, as stated in the amended complaint.

August had to be based on additional evidence obtained after his July release.[4] Magistrate Judge Bucklo properly dispensed with this objection: "Whether probable cause exists or not does not depend on whether a prosecutor decides to prosecute." R & R p.12. That is clearly the law. See, e.g., *Williams v. Kobel*, 789 F.2d 463, 468 (7th Cir. 1986) ("Probable cause for an arrest is less than that required for a bindover and is less than the quantum of evidence necessary for a criminal conviction"), quoting State v. Williams, 47 Wis.2d 242, 249, 177 N.W.2d 611 (1970).

Bostic takes issue with the Magistrate Judge's "refus[al] to hold that, before rearresting plaintiff in August of 1985, Pienta had any obligation to be aware of the exculpatory evidence that was known to the Chicago police department that Pienta could have learned about before rearresting plaintiff." Pl. Objections p.2. Bostic evidently refers to the repeated arrests of Lisa Hodges, Bostic's chief accuser, for disorderly conduct directed against Bostic. He also lists several other apparently exculpatory facts, including a letter written by Hodges and the "impossibility" of her story about having looked out a window and seen Bostic with the murder victim. Pl. Objections p.3.

The Report and Recommendation reveals not that Magistrate Judge Bucklo "refused" to take this information into account. Rather, she surveyed all the facts available to the police at the time of Bostic's arrest -- Messrs. Walton, Hampton, and Burks' identification of Bostic as a person with whom the victim had an altercation, Bostic's absence from work on the day after the murder, the empty holster recovered from Bostic's apartment -- and concluded that the police could reasonably have believed probable

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4. According to this theory, the police, in determining whether probable cause existed, should not have taken into account Bostic's absence from work the day after the murder, or the empty holster discovered in his apartment. Those facts were known to the police at the time of Bostic's release in July. Pl. Objections p.4.

cause existed to arrest Bostic.[5]

Whether or not probable cause actually existed on these facts is a close question. Whether qualified immunity exists is a different matter, however, "[E]ven in the absence of probable cause for an arrest, qualified immunity provides officers with an additional layer of protection against civil liability." Hughes v. Meyer, 880 F.2d 967, 970 (7th Cir. 1989), cert. den. 110 S.Ct. 2172 (1990). See also Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1348 n.15 (7th Cir. 1985) (distinction exists between standard used in determining existence of probable cause and less stringent standard used in determining officer's reasonable belief as to validity of probable cause). Based on the facts available to them in the Bostic investigation, defendants are entitled to qualified immunity.[6] The court therefore adopts the Magistrate Judge's recommendation in this regard, and grants defendants' motion for summary judgment on Count III.

In Count IV, Bostic charges the City with maintaining a policy of withholding relevant evidence, in this case, the results of witness polygraph examinations, resulting in the violation of his due process rights. Magistrate Judge Bucklo recommended granting

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5. The Magistrate Judge mentioned Bostic's refusal to stand in a line-up after his arrest in her probable cause discussion. Bostic's objection in this regard is well taken. Nevertheless, given the information that the police did have before rearresting Bostic, the Magistrate Judge's conclusion is fully justified.

6. In his objections, Bostic first argues that "the conflicting trial testimony of Walton and Hampton raises doubts about the veracity of the reports, as well as doubts about the truthfulness of Pienta's claims that he witnessed Walton and Hampton make the identification." Pl. Objections p.5. Immediately thereafter, Bostic acknowledges that "the qualified immunity turns on what Pienta reasonably should have known when he was arrested." Id. The latter point is exactly right; the former is therefore irrelevant to the question of qualified immunity.

summary judgment to defendants because Bostic "presented no evidence that the City had a policy of maintaining separate polygraph files..." R & R p.19. Bostic objects for the reason hat "this would be a basis for denying plaintiff's motion for summary judgment, but is not grounds for granting the City's crossmotion." Pl. Objections p.5 (emphasis original).

The City of Chicago cannot be held liable under Section 1983 unless Bostic establishes a custom or policy of the City that caused his injury. Monell v. Department of Social Services, 436 U.S. 658, 690-94 (1978). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy..." City of Oklahoma City v. Tuttle, 471 U.S. 822, 824 (1985). The burden is Bostic's; he has failed to carry it; the Magistrate Judge correctly recommended granting defendants' motion for summary judgment.

In sum, for the reasons stated above, the court adopts Magistrate Judge Bucklo's Report and Recommendation with respect to Counts III and IV, and does not follow it with respect to Counts I, II, and V because of a subsequent decision by the United States Supreme Court. Accordingly, Bostic's motion for summary judgment is denied on all counts. Defendants' motion for summary judgment is granted on all counts.

DATED: May 22, 1991

ENTER: /s/ John A. Nordberg
United States District Judge

[caption omitted in printing]

REPORT AND RECOMMENDATION

Ray Bostic filed a five-count second amended complaint alleging that the City of Chicago ("City") and Chicago Police Department ("CPD") detectives James Pienta and William Marley violated his rights under 42 U.S.C. 1983 when he was arrested and subsequently tried for the murder of Curtis Cotton. Both parties have filed motions for summary judgment. Mr. Bostic seeks summary judgment on Counts I through IV: the defendants seek summary judgment on all five counts of the complaint. I recommend that the case proceed to trial on Count V, summary judgment be granted for Mr. Bostic on Counts I and II, and summary judgment be granted to detective Pienta on Count III and to the City of Chicago on Count IV.

Facts[1]

In early morning hours of June 30, 1985, Curtis Cotton was shot to death outside the Illusion Lounge in Chicago, Illinois. He was shot twice in the chest at close range. Stipulation 2.01. CPD detectives James Pienta and William Marley were assigned to investigate the murder. Stipulation 3.01. According to witnesses at the scene, Mr. Cotton had an argument over a beer with another male patron at the Illusion Lounge. Chicago's 12(m) Statement, 5(a). On July 2, 1985, an anonymous female telephoned the CPD emergency number and identified Mr. Bostic as the murderer. Chicago's 12(m) Statement, 12. The detectives were able to trace the call to Lisa Hodges who stated during the course of an

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1. In addition to their Local Rule 12 statements, the parties have filed a stipulation of agreed upon facts. Unless otherwise indicated, the facts set forth were taken from that stipulation. Those facts taken from the parties' Local Rule 12 statements are facts which are in agreement but which are not included in the stipulation.

interview that she was at the Illusion Lounge on the night of the murder and that immediately after she heard gunfire, saw Mr. Bostic lowering a gun and putting it into his pocket. Chicago's 12(m) Statement, 13. The detectives then went to Mr. Bostic's apartment and finding him not home, left their card. Plaintiff's 12(m) Statement; Chicago's 12(n) Statement.

In the early morning hours of July 3, 1985, Mr. Bostic went to the Area 2 police station at the detectives' request and was placed under arrest for Mr. Cotton's murder. Stipulation 3.04. By the evening of July 3, Mr. Bostic had been identified by Messrs. Hampton and Walton as the man who argued with Mr. Cotton on the night he was killed. Chicago's 12(m) Statement, 22. In addition, a search of Mr. Bostic's apartment revealed a .38 caliber, Smith & Wesson revolver, cartridges and empty holster for another gun. Chicago's 12(m) Statement, 19. Mr. Bostic is a correctional officer at the Illinois Department of Corrections at the Stateville Correctional Center. Stipulation 1.01. The detectives also contacted the State's Attorney Felony Review Unit and late in the evening of July 3, Assistant State's Attorney James Andreou rejected filing charges against Mr. Bostic, telling the officers to interview other persons who were present at the bar on the night in question. Andreou Dep. at 19 (Bostic Ex. 42). Despite Mr. Andreou's determination on July 3, Mr. Bostic was not released from custody until 1:30 a.m. on July 5, 1985. Chicago's 12(m) Statement, 36; Mr. Bostic's 12(n) Response. The extended detention of Mr. Bostic was pursuant to Chicago Police Department General Order 78-1.[2]

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2. Defendants admit that General Order 78-1 was in force at all times relevant to this issue (Defendants' 12(m) Statement, §37), and that defendants Pienta and Marley referred the issue of Mr. Bostic's continued detention to the area commander pursuant to this order (Defendants' 12(m) Statement, § 28). In its answer to paragraph 17 of the second amended complaint, the City also admitted that defendants Pienta and Marley caused Mr. Bostic to be held until 1:30 a.m. on July 5, 1985, pursuant to General Order 78-1.

Mr. Bostic's ordeal with the CPD was far from over. On August 5, 1985, he returned to he Area 2 station and was again arrested by detective Pienta when he refused to stand in a line-up. Stipulation 4.04. Following the line-up (in which Mr. Bostic "participated"), the State's Attorney Felony Review Unit was again contacted, and Assistant State's Attorney Charles Hughes approved filing murder charges against Mr. Bostic. On August 6, 1985, Mr. Bostic appeared before Judge Dennis Horan at Night Bond Court in Branch 80 of the Cook County Circuit Court and bond was set at $100,000, which Mr. Bostic was unable to meet. Chicago's 12(m) Statement, 43; Mr. Bostic's 12(n) Statement, Response.

The grand jury returned an indictment on August 30, 1985, charging Mr. Bostic with murder and armed violence. Chicago's 12(m) Statement, 49; Mr. Bostic's 12(n) Statement, Response. On April 29, 1986, Judge Fred Suria conducted a one-day bench trial and found Mr. Bostic not guilty and released him from custody.

Count I

Mr. Bostic alleges that he was unlawfully detained by the detectives from the evening of July 3, when assistant state's attorney Andreou rejected filing charges against him, until July 5, when he was released.[3] The detectives contend that they are entitled to qualified immunity on this claim and that as a matter of law Mr. Bostic cannot establish a Fourth Amendment violation or that they are responsible for any violation that occurred.

"[P]ublic officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person should have known." *Auriemma v. Rice*, 910 F.2d 1449, 1452 (7th Cir. August 20, 1990), quoting *Doe v. Bobbit*, 881

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3. He does not contend that his arrest or his detention between "the early hours" of July 3 and the state's attorney's rejection of the officers' request that he file charges later in the evening of July 3 violated his constitutional rights. Stipulation 3.07.

F.2d 510, 511 (7th Cir. 1989). A right is clearly established when a reasonable official would understand that what he was doing violates that right; to determine whether a right is clearly established, the court will look to closely analogous case law. *Klein v. Ryan,* 847 F.2d 368, 371 (7th Cir. 1988). On June 5, 1985, the Seventh Circuit held in *Llaguno v. Mingey,* 763 F.2d 1560 (7th Cir. 1985), *cert. denied,* 107 S.Ct. 16 (1986), that once the routine paperwork and booking procedures were completed, Mr. Llaguno was required to go before a judicial officer to determine if there was probable cause to detain him further and that the Chicago police officers involved in his 42-hour detention were liable under Section 1983 for his extended detention beyond the "brief period that would have been necessay to book him and bring him before a magistrate." In *Llaguno,* the court relied on *Gerstein v. Pugh,* 420 U.S. 103, 43 L.Ed.2d 54, 65 (1985), in which the Supreme Court previously had held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."

In *Llaguno,* the court had specifically held that police could not keep a suspect in jail "beyond the brief period that would have been necessary to book him and bring him before a magistrate" which they sought further evidence to confirm their suspicions. 763. F.2d at 1568. Defendants in this case seek to avoid this holding by arguing that they intended to bring other persons in to view a line-up and that this is a proper administrative incident of arrest. In support of this contention, they unaccountably cite *Sanders v. City of Houston,* that any detention for this or any other purpose longer than 24 hours following an arrest without bringing the arrestee before a magistrate violated the Fourth Amendment.[4] In this case, assuming that a line-up sometimes could be considered

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4. Defendants also mistakenly rely on *Brown v. City of Chicago,* 713 F.Supp. 250 (N.D. Ill. 1989). There, the defendant was released when the state's attorney declined to prosecute. Furthermore, the total time the defendant was held was less han 24 hours.

an administrative incident of arrest, Mr. Bostic had already been held 24 hours at the time the state's attorney declined to charge him. The only purpose in holding him for any additional time was, as the state's attorney stated in his deposition, to try to find further evidence. This detention was in direct contravention of the holding of *Llaguno* and violated Mr. Bostic's Fourth Amendment rights.

Detectives Pienta and Marley also argue that they went off duty at 5 a.m. on July 4, 1985, and that they cannot be held liable for the fact that other persons were responsible for not releasing Mr. Bostic. They also argue that the watch commander made the decision to hold Mr. Bostic after the state's attorney declined to charge him. I disagree. Under the provisions of General Order 78-1, extended detention is initiated by criminal investigation division personnel, which in this case would have been detectives Pienta and Marley. The provision states that the "watch commander will ordinarily honor such requests" and that in his report he shall note the name of the person making the request. (Plaintiff's Exhibits, Tab 19, Vol. II, sec. VI, C2a and b.) The arrest report in this case (Plaintiff's Exhibits, Tab 5) states that extended detention was requested by "A/O," which detective Dignan testified means "arresting officer." The arresting officers, it is undisputed, were detectives Marley and Pienta.

Notably, detectives Marley and Pienta do not deny that they requested extended detention or state that the arrest report is inaccurate.[5] In their affidavits, they state only that they "advised the

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5. Furthermore, in his Rule 12(m) Statement, Mr. Bostic stated that "Pienta and Marley invoked the 'extended detention' policy of Chicago Police Department General Order 78-1. . ." 5.06. Defendants objected generally, stating only that the statement was "inaccurate, incomplete and misleading" and referring to their own statement of uncontested facts. Nowhere in that statement, however, or in the affidavits of Pienta and Marley, is there a denial that they were the instigators of the extended detention policy in this case. Their general denial in response to Mr. Bostic's statement is not entitled to any consideration. *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990); Local Rule 12N ("That response shall contain ... in the case of

area coordinator of the status of the case'' and ''[he] directed detective Marley [Pienta] and me to transfer Bostic to the 5th District lock-up. At his direction, I presented Bostic to the Watch Commander of he 5th District lock-up and after reviewing the case, the Watch Commander made the determination to hold Bostic in the lock-up.'' Pienta Aff., 8; Marley Aff., 7. But at most all this indicates is that the procedure stated in General Order 78-1 was followed in this case. The order provides that the investigating officers shall make their request for continued detention to their area coordinator. Defendants do not say that they did not request that extended detention be invoked, and there is no evidence in the record to contradict the evidence that they did request extended detention, pursuant to procedure stated in General Order 78-1.

Since the evidence is undisputed that detectives Pienta and Marley requested and obtained Mr. Bostic's extended detention beyond the time the state's attorney decided not to charge Mr. Bostic, pursuant to General Order 78-1, and beyond the brief period of time necessary to book him and bring him before a magistrate, solely for further investigation, they are legally responsible for Mr. Bostic's detention until 1:30 a.m. on July 5, 1985. *Malley v. Briggs*, 475 U.S. 335, 344-45 n. 7 (1986) (judge's decision to issue warrant does not break casual chain between application for warrant and arrest for purposes of Section 1983 liability); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 ''should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'')

Since the teachings of *Llaguno* and *Gerstein* established a right that was sufficiently clear at the time of Mr. Bostic's arrest that any reasonable officer would understand that suspect could not be held for an extended period of time without probable cause determination by a judicial officer, detectives Pienta and Marley are not entitled to qualified immunity. I therefore recommend that Mr.

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any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon . . . .'').

Bostic's motion for summary judgment on Count I of his second amended complaint be granted and that defendants' opposing motion be denied.

Count II

The parties agree that Mr. Bostic was held pursuant to the extended detention policy set forth in Chicago Police Department General Order 78-1, Section VI(C)(2). Mr. Bostic argues that General Order 78-1 is an unlawful municipal policy because "[t]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest," *Gerstein v. Pugh, supra,* 420 U.S. at 114, and that he is therefore entitled to judgment against the City of Chicago.

The City contends that no part of 78-1 allows detention for any other reason than the administrative steps incident to arrest. The City's argument is frivolous inlight of the fact that paragraph C-2 has twice been held unconstitutional by courts in this district for this reason. *Robinson v. City of Chicago,* 638 F.Supp. 186, 191-93 (N.D. Ill. 1986), *rev'd on other grounds unrelated to the merits (lack of standing),* 868 F.2d 959 (7th Cir. 1989); *Willis v. Bell,* 726 F.Supp. 1118, 1124-25 (N.D. Ill. 1989).

> Paragraph C-2 permits the exact type of extended detention which the Court in Gerstein found repugnant to Fourth Amendment rights. It specifically provides that an arrestee's detention be extended beyond the time when he would normally be sent before a magistrate so that police officers may continue the investigation. The reasoning behind this policy of extended detention is obvious; to build a case against a defendant while he is in jail. However, the teaching of Gerstein in this regard is clear--hoping to build a case is not a permissible reason for jailing someone indefinitely.

Robinson v. City of Chicago, supra, 638 F.Supp. at 192; *Willis v. Bell,* supra, 726 at 1125. When a municipal policy or custom causes a constitutional violation, the municipality may be held liable under Section 1983. *Monell v. Department of Social Services,* 436 U.S. 658, 694, (1978).[6]

Since there is no issue of fact that Mr. Bostic was held beyond "the brief period necessary to book him and bring him before a magistrate" pursuant to the extended detention policy and that policy violated Mr. Bostic's constitutional rights, I recommend that Mr. Bostic's motion for summary judgment against the City of Chicago be granted, and that the City's motion for summary judgment be denied.

Count III

Mr. Bostic alleges that detective Pienta arrested him on August 5, 1985, without probable cause in violation of his Fourth Amendment rights. Detective Pienta first contends that the state court found that there was probable cause to arrest Mr. Bostic at his bond hearing, and that collateral estoppel therefore bars Mr. Bostic's claim. Contrary to his contention, the transcript of Mr. Bostic's bond hearing on August 5, 1985, shows that no judicial finding of probable cause was made. The bond hearing (which must have lasted less than one minute) consisted in a statement by the state's attorney that "for the purpose of the Gerstein hearing, the People would seek to prove the following facts at trial. On the fifth of August, 1985, in the vincinity of 727 East 111th Street, this Defendant committed the act of murder by shooting Mr. Curtis Cotton with one gun shot wound to the chest which was observed by two eyewitnesses." The judge then set bond at $100,000, without finding probable cause. (In fact, the murder for which Mr. Bostic was held took place on June 30 and at a different location than stated by the prosecutor.) Unless a defendant is given "a full and fair opportunity to litigate his probable cause challenges in the

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6. Chicago also contends Mr. Bostic must show that it acted with "deliberate indifference" when it violated his rights in order to assess liability under section 1983 and as support cites *Canton v. Harris*, 489 U.S. 378, 103 L.Ed.2d 412 (1989). The claim in that case involved a valid municipal policy which was unconstitutionally applied. The municipal policy in this case is unconstitutional; that argument accoringly is without merit.

preliminary hearing,'' involving at least minimum procedural fairness, collateral estoppel cannot defeat a subsequent challenge to probable cause. *Guenther v. Holmgreen,* 738 F.2d 879, 884-889 (7th Cir. 1984); *Whitley v. Seibel,* 676 F.2d 245, 248 (7th Cir. 1982). Thus, even if the judge had made a determination of probable cause, under *Whitley v. Seibel, supra,* 676 F.2d at 248 and *Guenther v. Holmgreen, supra,* 738 F.2d at 885, this cursory hearing would not prevent a subsequent challenge to probable cause. See also *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982) and *Allen v. McCurry,* 449 U.S. 90 (1980).

Detective Pienta next argues that he could have reasonably found that probable cause existed for his rearrest of Mr. Bostic on August 6, 1985,[7] on the basis of (1) the identification by three persons, Messrs. Walton, Hampton and Burks, of Mr. Bostic as a man with whom the victim, Mr. Cotton, had an argument at the Illusion Lounge on the night Mr. Cotton was killed; (2) Lisa Hodges' statement to police that she saw Mr. Bostic ''with a gun in his hand, standing over Cotton's body, shortly after the shooting;'' and (3) the fact that a holster for a gun was found in Mr. Bostic's apartment which Mr. Bostic stated was for a gun his brother had lost.

Based on my review of the record, at the time detective Pienta arrested Mr. Bostic on August 5, he knew the following: Both Mr. Walton and Mr. Hampton, who were friends of Mr. Cotton, had idenified Mr. Bostic as a person with whom Mr. Cotton had had some ''altercation'' (as used in the police report) at the Illusion Lounge earlier the evening of Mr. Cotton's murder. The ''altercation'' consisted in Mr. Cotton's having picked up a beer, some person grabbing it from him saying it was his, and Mr. Cotton

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7. Mr. Bostic's argument that because he was not charged in July when the state's attorney decided the police should obtain more evidence, probable cause to arrest him in August had to be based on additional evidence obtained after he was released in July, is baseless. Whether probable cause exists or not does not depend on whether a prosecutor decides to prosecute.

grabbing it back, saying "you just had to say it was your beer." The witnesses told detective Pienta that the person with whom Mr. Cotton had the altercation left the Illusion Lounge, but later returned. According to the police reports, Mr. Walton and Mr. Hampton identified Mr. Bostic in a line-up as the person with whom Mr. Cotton had the disagreement over the beer. Mr. Burks, the manager of the Illusion Lounge, also identified Mr. Bostic as the person with whom Mr. Cotton had the disagreement, according to the police reports.[8] When the police interviewed Mr. Bostic, he stated he was not at the Illusion Lounge at all on the night in question.

Based on these identifications, detective Pienta was entitled to believe Mr. Bostic was lying about his presence at the Lounge. Detective Pienta could also believe there was evidence that Mr. Bostic had been involved in an argument or disagreement at the Illusion Lounge with the victim on the evening Mr. Cotton was killed.

The evidence available to detective Pienta with regard to Lisa Hodges was, first of all, her statement that she saw Mr. Bostic having an argument with Mr. Cotton in the Illusion Lounge that night, later saw Mr. Bostic leave, heard shots, and, looking out a window, saw Mr. Bostic put down a gun and run away. The difficulty facing detective Pienta in evaluating this statement was that Ms. Hodges had been Mr. Bostic's girlfriend, had apparently had his baby, and the relationship had ended some months before. Since that time, Mr. Bostic had had Ms. Hodges arrested for disorderly conduct in connection with alleged threats against him. It is not clear from the record, however, that Mr. Bostic told the police about these arrests. (Mr. Bostic says only that the police should have known about them.) The mere fact that the arrest records were in police department records is not enough to charge these police officers with knowledge of them since there is no claim that any of the

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8. Memorandum in Support of Defendant's Motion for Summary Judgment at 26-27.

investigating officers were told about them. *See Illinois v. Andreas*, 463 U.S. 765, 771 n. 5 (1983). The evidence does indicate, however, that the police officers at least knew Ms. Hodges was an ex-girlfriend, and that there "were problems between the two of them" (Pienta Dep. at 20).

At the time of Mr. Bostic's arrest in August, detective Pienta knew three additional facts. First, Mr. Bostic had not shown up at work on the morning after the murder and, contrary to his general practice, he had telephoned in saying he was sick. Second, the police had recovered an empty holster from Mr. Bostic's apartment, which Mr. Bostic stated was for a gun he had "lost." Third, on the night in August when Mr. Bostic was arrested, he had refused to stand in a line-up. None of these facts have much significance in themselves, but in determing whether he had probable cause to arrest Mr. Bostic, detective Pienta was entitled to consider all facts at his disposal. "Probable cause exists when the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable cause in the belief that 'an offense has been or is being committed.'" *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (brackets in original).

In this case, if all the police had were Ms. Hodges' statements, I will assume for purposes of this motion that detective Pienta would not have had probable cause to arrest Mr. Bostic on August 6, 1985, based on the fact that he knew there had been a relationship between the two persons, that it had ended, and that there were problems. But Ms. Hodges' statement placing Mr. Bostic in the Illusion Lounge and arguing with the decedent were confirmed by several persons. This also meant that detective Pienta could believe that Mr. Bostic was lying about his presence in the lounge and it tended to make the remaining part of Ms. Hodges' statement more credible. Although the question is close, I conclude that based on the evidence of the argument, Mr. Bostic's apparent lie about his presence,[9] Ms. Hodges' identification of him as the

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9. Mr. Bostic argues that his exhibit 2 shows he went to a video store and rented videos on the night in question and that this fact corroborates his alibi. Assuming it shows he took out the

murderer, and the other facts discussed above, I cannot say that "no reasonable police officer could have mistakenly believed that he had probable cause to arrest" Mr. Bostic. *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988). Accordingly, whether or not there was in fact probable cause for Mr. Bostic's arrest, since I believe "reasonable officers in their position could have thought they had probable cause" *id.* at 995 (emphasis in original), detective Pienta is entitled to qualified immunity. *Id.* at 994. Accordingly, detective Pienta's motion for summary judgment on Count III should be granted, and Mr. Bostic's motion for summary judgment on this Count should be denied.

Count IV

Mr. Bostic claims that his due process rights were violated because Chicago has a municipal policy of withholding witnesses' polygraph examination results and that had these results been released, Mr. Bostic's incarceration and trial would have ended sooner than it did.

Mr. Bostic bases his argument on a description of two persons involved in a shooting that a witness, Debra Wallace, allegedly gave police. The description is of two young black males who do not fit Mr. Bostic's physical characteristics. This description is contained in a polygraph report. Plaintiff's Exhibits, Tab 7, Vol. 1. The polygraph examination report is maintained in a file separate from the police investigative file. In response to Mr. Bostic's request during the criminal proceedings for all witness statements, the prosecutor subpoenaed the investigative or street file. He also submitted a written answer to discovery (Plaintiff's Exhibits, Tab

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videos on the date in question (there is no indication where the record came from), the evidence would not show that he was not at the Illusion Lounge on the evening of June 29. Neither is probable cause to be determined by what an officer could have known if he had investigated all possible evidience. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 2696 (1979).

9, Vol. 1) in which he represented that all memoranda summarizing oral statements by witnesses were contained in police reports provided to Mr. Bostic.[10] This was not true because the Wallace statements in the polygraph report were not produced.

In *Jones v. City of Chicago, supra,* 856 F.2d at 995, the Court held that the maintenance of separate "'street files' withheld from the state's attorney and therefore unavailable as a source of exculpatory information that might induce him not to prosecute or, failing that would at least be available to defense counsel under *Brady v. Maryland,* 373 U.S. 83 ..." denied criminal defendants due process.

The City argues both that the statement was immaterial and that since Mr. Bostic was acquitted, there was no violation of due process in failing to provide the statement. In fact, however, Ms. Wallace's description of two offenders that bore little resemblance to Mr. Bostic was exculpatory evidence that was highly material to his defense. The fact that he was acquitted without it fails to relieve the due process violation. *Jones v. City of Chicago, supra,* 856 F.2d at 995-96 (if exculpatory evidence had been provided to the state's attorney, he might have decided not to prosecute or the trial might have ended sooner than it did).

Count IV is, however, directed at the City. For the City to be liable, Mr. Bostic must establish that the statement was withheld from him as a result of a custom of the City of Chicago. *Id.* at 996. The City states that the fact that Mr. Wallace was given a polygraph examination was noted in material provided to Mr. Bostic. Mr. Bostic has presented no evidence that the City had a policy of maintaining separate polygraph files[11] or that it did so for the

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10. In view of this statement, Chicago's argument that Mr. Bostic did not formally request witness statements is irrelevant. He would have no reason to file a written request. *Cf., Fleming v. Kemp,* 748 F.2d 1435, 1448 (11th Cir. 1984) ("a formal Brady motion was unnecessary ... as the prosecutor had already given counsel full access to his file.").

11. Mr. Bostic notes that in his 12(1) Statement of uncontested facts, he stated that the nondisclosure was pursuant to a policy

purpose of preventing disclosure in criminal cases. *See id.* at 995.[12] Without this evidence, the City cannot be held liable for violations of Section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *City of Canton v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 1203 (1989). I therefore recommend that the City of Chicago's motion for summary judgment on Count IV be granted and that Mr. Bostic's motion for summary judgment on this Count be denied.

Count V

Count V alleges that detective Pienta and Marley suppressed exculpatory evidence which they acquired on February 27, 1986 (the initial criminal trial date) and that had they revealed it, Mr. Bostic's incarceration would not have extended until April 27,

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of the City and that in response, the City failed to point to specific evidence in contending that Mr. Bostic's statement was inaccurate. However, Mr. Bostic's statement referred to the deposition of state's attorney Schultz, in support of his statement and there, Mr. Schultz stated, contrary to Mr. Bostic's argument, that this was the only polygraph report he had ever seen that indicated the questions asked and answers given. Plaintiff's exhibits, Tab 59 Vol. VII. Mr. Bostic's own evidence therefore refutes his claim of a policy of witholding relevant evidence and he has presented no other evidence to support his claim.

12. Contrary to Mr. Bostic's argument, the subpoena issued by the state's attorney did not seek all documents pertinent to the case. It sought the street or investigative file. While there is no evidence that the state's attorney knew this might not result in the production of all pertinent information, there is also no evidence that the police department or anyone else realized that a crime laboratory report such as the polygraph report in this case might not be disclosed as a result of its segregation (or that this was even the usual custom).

1986 (the date his trial was actually held). Detectives Pienta and Marley seek summary judgment on this Count, on several grounds.

Defendants argue that Evelyn McMiller told the assistant state's attorney that she could not identify Mr. Bostic as the murderer when she first saw Mr. Bostic in the courtroom at his February, 1986 trial date and that they therefore had no obligation to inform the prosecuting attorney of what he already knew. But in her deposition, Ms. McMiller testified that the man she talked to in court may have been a police detective and not the state's attorney. Compare Defendants' 12(1) Statement, 64; Plaintiff's 12(m) Response; Plaintiff's exhibits, Tab 40, Vol. IV, E. McMiller Dep. at 13. This conflict in testimony cannot be resolved on summary judgment.

Defendants also argue that the duty to convey exculpatory information to the prosecutor was not so well established in 1986, that detectives Pienta and Marley can be held liable for failure to inform the state's attorney of this information. The right or duty "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Mr. Bostic relies on the statement in *Jones v. City of Chicago, supra*, 856 F.2d at 994, that if "police officers have been instrumental in plaintiff's continued confinement or prosecution," they may be subject to Section 1983 liability. *Jones* actually involved intentional misconduct that led to a prosecution, however, where a duty to correct misinformation undoubtedly continued. Here there is no evidence that the police officers intentionally concealed facts from the prosecutor leading to the charges against Mr. Bostic. Nevertheless, courts have held that "[a] person who places before a prosecuting officer information upon which criminal proceedings are begun, and who later acquires additional information casting doubt upon the accused's guilt, should be under an obligation to disclose his discovery to the prosecutor." *Clarke v. Montgomery Ward & Co.*, 298 F.2d 346, 348 (4th Cir. 1962). *Accord Goodwin v. Metts*, 885 F.2d 157, 161 (4th Cir. 1989) (referring to both Jones and Clarke, as well as other cases, and holding investigating officer's duty included "obligation to disclose exculpatory information acquired after the initiation of criminal proceedings"). In *Goodwin*, the Fourth Circuit rejected the qualified immunity claim asserted here, finding that a "reasonable officer would have known that a prosecution carried out without ...

disclosure of exculpatory information would violate the constitutional rights of defendants." Id. at 164.

I recommend that the defense be similarly rejected here. Any reasonable officer should know that if two eye witnesses state that a defendant -- here already incarcerated for several months -- is not the guilty party, that information should be promptly brought to the attention of the prosecuting attorney. Since there is a question of fact as to what the state's attorney knew, however, summary judgment should be denied.

Conclusion

I recommend that summary judgment be granted to Mr. Bostic on Count I an II, that summary judgment be granted to detective Pienta on Count III and to the City of Chicago on Count IV and that detectives Pienta's and Marley's motion for summary judgment be denied on Count V.

Dated: December 13, 1990.

/s/ Elaine Bucklo
United States Magistrate Judge